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No. 08-1363

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In the

Supreme Court of the United States

JOHN ARTER NARRON, III,

Petitioner,

v.

STATE OF NORTH CAROLINA ,

Respondent.

On Petition for a Writ of Certiorari to the North Carolina Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASON WHY THE PETITION SHOULD BE DENIED 1

THE STATUTORY LANGUAGE OF SECTION 20-138.1 OF THE NORTH CAROLINA GENERAL STATUTES, WHICH DICTATES THAT "THE RESULTS OF A CHEMICAL ANALYSIS SHALL BE DEEMED SUFFICIENT EVIDENCE OF A PERSON'S ALCOHOL CONCENTRATION," DOES NOT CREATE AN UNCONSTITUTIONAL MANDATORY PRESUMPTION AND THE NORTH CAROLINA COURT OF APPEALS CORRECTLY REJECTED THE DEFENDANT'S CLAIM. 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Breithaupt v. Abram, 352 U.S. 432(1957) 8

Carella v. California, 491 U.S. 263 (1989) 4,5

County Court of Ulster County v. Allen,
442 U.S. 140 (1979) 2

Francis v. Franklin,
471 U.S. 307, 313 (1985) 2,3,4

In re Winship, 397 U.S. 358 (1970) 2

Koonce v. Pepe, 99 F.3d 469 (1st Cir. 1996) 6

Perez v. Campbell, 402 U.S. 637(1971) 8,9

Sandstrom v. Montana,
442 U.S. 510 (1979) 3,4

State v. Brayman, 751 P.2d 294 (Wash. 1988) 7

State v. Corbett, 168 N.C. App. 117,
607 S.E.2d 281(2005), *aff'd by*,
360 N.C. 287, 624 S.E.2d 625,
cert. denied, 549 U.S. 993 (2006) 7

State v. Locklear,
331 N.C. 239, 415 S.E.2d 726 (1992) 7

State v. Kubik,
456 N.W.2d 487, 501 (Neb. 1990) 7

State v. Narron, __ N.C. App. __,
666 S.E.2d 860, *disc. review denied*,
363 N.C. 135, 674 S.E.2d 140 (2009) 2, 5, 6

State v. Shuping,
312 N.C. 421, 323 S.E.2d 350 (1984) 5

State v. Torain, 316 N.C. 111, 340 S.E.2d 465,
cert. denied, 479 U.S. 836 (1986) 7

STATUTORY PROVISION

N.C. GEN. STAT. § 20-138.1 . . . . . 1, 5, 6, 7

REASON WHY THE PETITION SHOULD BE DENIED

THE STATUTORY LANGUAGE OF SECTION 20-138.1 OF THE NORTH CAROLINA GENERAL STATUTES, WHICH DICTATES THAT "THE RESULTS OF A CHEMICAL ANALYSIS SHALL BE DEEMED SUFFICIENT EVIDENCE OF A PERSON'S ALCOHOL CONCENTRATION," DOES NOT CREATE AN UNCONSTITUTIONAL MANDATORY PRESUMPTION AND THE NORTH CAROLINA COURT OF APPEALS CORRECTLY REJECTED THE DEFENDANT'S CLAIM.

In his petition, Petitioner asserts that this Court should issue this petition because the opinion of the North Carolina Court of Appeals is in conflict with opinions of this Court. Here, however, the Petitioner has failed to show that the opinion of the North Carolina Court of Appeals is in any way in conflict with prior holdings of this Court. Moreover, as seen by the analysis of the Court of Appeals, the Petitioner has failed to show merit to his claims. Accordingly, this petition should be denied.

To support his position that the Court of Appeals' opinion is in conflict with opinions of this Court, the Petitioner contends that the 2006 statutory changes to North Carolina's driving while impaired laws created a statute which has an unconstitutional presumption

of fact in the prosecution of driving while impaired cases. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). Specifically, the Petitioner questions the constitutionality of section 20-138.1(a)(2) of the North Carolina General Statutes, which dictates that the "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration." As seen in the Court of Appeals' opinion, this statutory amendment did not create of presumption of fact but instead codified an issue that was a matter of law. *State v. Narron*, __ N.C. App. __, 666 S.E.2d 860, 864-867, *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140 (2009). Because the petition and arguments raised therein are based on the language of the statute, and not the actual jury instructions given, this response shall focus on the statute.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This principle "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985).

"A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves

certain predicate facts." *Id.* at 314. In other words, such a presumption instructs the jury "to suppose to be true without proof" an elemental fact based upon the proof of a predicate fact. *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979).

In *Sandstrom*, this Court considered whether a jury instruction in a murder prosecution amounted to an unconstitutional mandatory presumption. The petitioner contended the instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" relieved the State of its burden to prove beyond a reasonable doubt that the killing was done purposely or knowingly.

This Court in *Sandstrom* held that an unconstitutional mandatory presumption encompasses (1) an irrebuttable direction by the trial court to the jury to find an element once it is convinced of facts triggering the presumption or (2) a direction by the trial court to the jury to find an element based upon other facts if the defendant does not come forward with more than "some" evidence to rebut the presumption. *Id.* at 517. This Court found the instruction given in *Sandstrom* unconstitutional for either of two reasons: "[u]pon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), *Sandstrom's* jurors could reasonably have concluded that they were

directed to find against defendant on the element of intent"; or the jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state." *Id.* at 523-24.

A crucial point in *Sandstrom* is that the instruction permitted the jury to find an element – intent – based upon facts "insufficient" to prove intent. As this Court noted, evidence of voluntariness and ordinary consequences do not themselves prove intent. The jury was required to suppose the existence of intent based upon evidence of other facts.

Other cases decided by this Court involving mandatory presumptions have focused on instructions similar to the one in *Sandstrom*. In *Franklin*, for instance, this Court found unconstitutional "instructions stating that: (1) '[the] acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted' and (2) '[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.'" 471 U.S. at 309; *see also Carella v. California*, 491 U.S. 263 (1989) (considering instructions that intent to commit fraud and embezzlement were presumed after leased or rented

property was not returned within a certain number of days after return was demanded or a lease expired).

With this petition, the Petitioner has not specifically questioned the jury instruction given. Instead, the Petitioner has argued that the language of section 20-138.1 of the North Carolina General Statutes creates an unconstitutional presumption. In its opinion below, the North Carolina Court of Appeals clearly explained that the amendment to section 20-138.1 did not create a presumption of fact. *Narron*, 666 S.E.2d at 864-867. Instead, this statutory amendment established this issue as a matter of law, not of fact. As seen by this analysis, because no presumption of fact was created in this statute, no constitutional violation occurred.

The amendment to section 20-138.1 codified language that was an issue of a matter of law. As seen in the Court of Appeals' opinion, the court correctly found that this provision "simply states the standard for prima facie evidence of a defendant's alcohol concentration." *Narron*, 666 S.E.2d at 865. This new language, similar to the language previously found by the North Carolina Supreme Court in *Shuping* to be an appropriate statement of the law, did not create a legal presumption of a fact. *Narron*, 666 S.E.2d at 865-66 (citing *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984)). This provision did not create a legal presumption because "there is no 'presumption'

created with regards to some other element or factual issue." *Narron*, 666 S.E.2d at 866. In other words, this statute creates no presumption of any fact needed to be found by the jury based on the existence of another fact. Under this statute, the fact of the results of the defendant's chemical analysis are sufficient to prove a defendant's blood alcohol concentration. Simply stated, there is no presumption of a fact. *See generally*, *Koonce v. Pepe*, 99 F.3d 469, 473 (1st Cir. 1996) (no presumption created with the jury instruction given in a first degree murder case).

To give further clarification of why this amendment is not a presumption of fact, the N.C. Court of Appeals illustrated the difference. The court described how the amendment "does not state that 'results of a chemical analysis shall be deemed sufficient evidence to prove' e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway." *Narron*, 666 S.E.2d at 866. If the amendment had allowed for an inference of a defendant's operation of a motor vehicle based on the results of his chemical analysis, a presumption of fact would have occurred. In such a case, the Petitioner's arguments as stated in this petition could be applicable. However, as seen in section 20-138.1(a)(2), such a presumption does not occur. The amendment to this statute only "codifies the common law threshold for prima facie evidence of a defendant's alcohol concentration." *Narron*, 666 S.E.2d at 866. *See*

generally, *State v. Kubik*, 456 N.W.2d 487, 501 (Neb. 1990); *State v. Brayman*, 751 P.2d 294, 297-300 (Wash. 1988).

The distinction between including language that dictates an issue of a matter of law versus language that creates a circumstance that a presumption of fact is utilized is critical. If the language dictates a matter of law and does not create a situation were facts are presumed, the Petitioner can neither show that his constitutional rights were violated nor that the lower court's opinion is in conflict with holdings of this Court. *State v. Corbett*, 168 N.C. App. 117, 607 S.E.2d 281 (2005) (the trial court instructed the jury that as a matter of law certain facts are sufficient to prove the element, specifically release to a safe place in a kidnaping case), *aff'd by*, 360 N.C. 287, 624 S.E.2d 625, *cert. denied*, 549 U.S. 993 (2006); *State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 472, ("No 'presumption' is created when a trial judge fulfills his duty, where appropriate, as here, of declaring a weapon to be dangerous or deadly as a matter of law."), *cert. denied*, 479 U.S. 836 (1986). *State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992) ("No presumption of any kind arose here where the trial court merely fulfilled its duty by explaining the well-established rule of substantive law known as the doctrine of transferred intent.") As seen by the language of section 20-138.1 and the opinion of the lower court, this statute did not create a situation where facts are

presumed. Because no presumption of fact was created by this statutory amendment, the Petitioner has failed to show error.

For decades, this Court has acknowledged that impaired driving is a scourge upon our Country and has long recognized the validity of alcohol testing. As this Court has ruled:

> [t]he test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous

Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (footnote omitted); *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Justice Blackmon concurring, "The

slaughter on the highways of this Nation exceeds the death toll of all our wars.")

In our country, per se laws were designed to be a separate method for convicting drinking drivers and are not evidence of or a presumption of impairment. Under the per se law, the sole issue is the amount of alcohol in a person which can only be determined by scientific tests. Because this amendment codifies a threshold and is not a presumption of fact, it is not in conflict with any of the cases cited by the Petitioner in his petition. Moreover, because the State was required to prove all elements beyond a reasonable doubt, and because the Petitioner had the ability to attack the credibility of the results of the chemical analysis, the Petitioner has failed to show a constitutional violation. Accordingly, there is no cause for the issuance of the petition.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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